GOI CHING ANG

v.

PP

FEDERAL COURT, KUALA LUMPUR
EUSOFF CHIN CJ
CHONG SIEW FAI CJ (SABAH & SARAWAK)
EDGAR JOSEPH JR FCJ
MOHAMED DZAIDDIN FCJ
WAN ADNAN ISMAIL FCJ
[CRIMINAL APPEAL NO: 05-46 OF 1993]
2 MARCH 1999
[1999] CLJ JT(3)

CRIMINAL LAW: *Internal Security Act 1960 - Section 57(1)(a) & (b) - Unlawful possession of firearms and ammunition - Conviction - Whether improper - Information leading to discovery of firearms and ammunition - Whether wrongly admitted*

EVIDENCE: *Information leading to fact discovered - Evidence Act 1950, s. 27 - Scope and effect - Whether s. 27 related to s. 24 - Whether subject to s. 24 - Whether independent and distinctive of each other - Evidence Act 1950, ss. 24, 25, 26, 27*

EVIDENCE: *Information leading to fact discovered - Evidence Act 1950, s. 27 - Admissibility - Voluntariness of statement - Whether a condition for admissibility - Involuntary statement - Exclusion of - Whether court has discretion to exclude prejudicial evidence notwithstanding that evidence was 'technically admissible' - Evidence Act 1950, ss. 24, 25, 26, 27 - Civil Law Act 1956, s. 3(1)(a)*

The appellant in this case was charged with two offences under ss. 57(1)(a) & (b) respectively of the Internal Security Act 1960, following the discovery of three pistols and 51 live bullets in his rented house. The facts showed that the discovery was made as a result of the information, allegedly given by the appellant, that "Pistol disimpan dalam speaker box Mini Compo itu" ('the section 27 information'). In the court below, the appellant denied ever telling PW5 or PW7 as to the whereabouts of the offensive articles, and further gave evidence, which was uncontroverted, that the said house was also occupied by his girlfriend. This apart, on the authority of *Md Desa bin Hashim v. PP*, the appellant had also challenged the voluntariness, and hence the admissibility, of the section 27 information.

It was not in dispute that *Md Desa* in essence ruled that s. 27 of the Evidence Act 1950 ('1950 Act') was subject to s. 24, and hence, information under s. 27, in order to be admissible, must be voluntary. The learned judge, apparently, had entertained grave doubt as to the voluntariness of the section 27 information, but ruled, nonetheless, that the information, irrespective of its involuntary character, was admissible in evidence under s. 27 of the 1950 Act. The learned judge, in the circumstances, convicted the appellant on both charges and sentenced him to death on the the first charge.

The appellant appealed. In the event, the following issues *inter alia* arose for the determination of the apex court, namely: (i) whether s. 27 was governed by or subject to s. 24; (ii) whether ss. 24 and 27 of the 1950 Act were not inter-related and were independent of each other; and (iii) whether, assuming that the section 27 information herein was not voluntarily made, the same ought, in the interest of justice and fairness, to have been excluded.

Held:

Per Chong Siew Fai CJ (Sabah & Sarawak)

[1] The only evidence that connects the appellant to the second charge is his section 27 information. That information, however, made no mention at all of the bullets. It follows that the 51 bullets were accidentally discovered because they happened to be inside the same speaker box of the mini-compo in which the pistols were found, and not as a result of any section 27 information to that effect. The facts also showed that the prosecution had not established beyond reasonable doubt that it was the appellant who had placed the 51 bullets inside the speaker box. That being so, the second conviction is not sustainable and must be quashed.

[2] Apart from *Vijay Kumar v. State of Himachal Pradesh*, all the other cases cited by *Md Desa*, namely, *Ramkishan Mithanlal Sharma & Ors v. State of Bombay*, *Yee Ya Mang v. PP*, *R v. Ramasamy* and *Packiam & Anor v. PP*, do not support the proposition that s. 27 of the 1950 Act is governed by or is subject to s. 24. Further, since s. 24 relates to confessions, the decision in *Md Desa* subjecting s. 27 to s. 24 cannot have application to a s. 27 statement if that statement does not amount to a confession.

[3] It is a matter of construction of ss. 24 and 27 as to whether the latter is subject to the former. It is however pertinent to note, in this respect, that the judicial pronouncements on the independence and distinctiveness of s. 27 of the 1950 Act and its being regarded as an exception to s. 24 thereof are deeply rooted in our case law, and have stood unchallenged for decades.

[4] Having regard to the words of ss. 25 and 26 of the 1950 Act, there clearly is a necessity to determine the independent nature or otherwise of s. 27 as against those two sections. The same, however, cannot be said of s. 27 in relation to s. 24. Upon the wordings of ss. 24 and 27, there is, purely by reason of the language of the two sections alone, no nexus necessitating a determination as to whether one section is subject to or an exception to the other.

[4a] Section 27 of the 1950 Act, in other words, is silent as to or bears no ligature to the voluntary nature or otherwise of the information. The words "whether the information amounts to a confession or not" in the section relates merely to the character of the information, ie, whether it is a confession or statement falling short of a confession. Thus, unlike s. 27 when compared with ss. 25 and 26 of the 1950 Act, a comparison of s. 27 with s. 24 does not show that they contain any words or phrases bearing or capable of bearing any reference to one another. From their wordings, ss. 24 and 27 of the 1950 Act stand independently of each other.

[5] If s. 27 is subject to s. 24, it follows that it is also subject to other like provisions contained in other enactments, such as s. 113 Criminal Procedure Code, s. 37A Dangerous Drugs Act 1952, s. 75 Internal Security Act 1960, s. 15 Prevention of Corruption Act 1961 (repealed) and s. 45 Anti-Corruption Act 1997. However, having regard to the wordings of the provisions in those enactments, which provisions bear no reference to s. 27 of the 1950 Act, it would be beyond the function and outside the province of the court to so interpret. What more when the Supreme Court in *Wai Chan Leong v. PP* did pronounce that the admissibility of a section 27 information is attributable to "the express intention of the legislature" despite its apparent incompatibility with s. 24 of the 1950 Act. Clearly, any departure from the entrenched judicial interpretation thus laid down, would be a policy decision and should be left to the legislature.

[6] This court is not unaware of the desirability of protecting accused persons against any possible misuse of power by overzealous police personnel whilst under police custody. Indeed, this court is in complete agreement, as a matter of policy, with the view expressed in *Md Desa* of the desirability as to the voluntariness of section 27 information.

[7] In West Malaysia, by virtue of s. 3(1)(a) of the Civil Law Act 1956, the English common law as administered in England on 7 April 1956 applies except where other statutory provision has been made.

[7a] Considering that s. 24 of the 1950 Act has no application to a section 27 information, the operative part at the commencement of s. 3(1), namely, "Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia", clearly does not take away the discretionary power of the courts to exclude confessions in appropriate cases.

[7b] It follows that there is a vested discretion in a trial judge to exclude evidence which is prejudicial to an accused person even though the evidence is "technically admissible". In the circumstances, on the facts, it is pertinent to consider whether the section 27 information of the appellant ought, in the interest of justice and in fairness, to have been admitted.

[8] The trial judge had entertained grave doubt as to the voluntariness of the section 27 information of the appellant. That being so, it was open to the trial court to exercise its discretion whether to let in the information as part of the trial. The learned trial judge had not exercised the discretion. This court is therefore at liberty to exercise.

[9] Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected. Here, since the learned judge had found that the section 27 information was not voluntarily made, it is irrelevant. It was not the appellant's own statement and was extracted from him in contravention of the privelege against self-incrimination and would be unfair to have it admitted against him. The learned trial judge, therefore, ought not to have admitted it.

[10] With the exclusion of the section 27 information, there is also no or insufficient evidence to justify the conviction of the appellant on the first charge. The appeal is accordingly allowed.

[Appeal allowed; appellant acquitted and discharged; convictions and sentence quashed and set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu didalam kes ini disabitkan dengan dua kesalahan masing-masingnya di bawah s. 57(1)(a) & (b) Akta Keselamatan Dalam Negeri 1960, ekoran terjumpanya tiga pistol dan 51 butir peluru hidup dalam rumah yang disewa oleh perayu. Fakta menunjukkan bahawa penemuan tersebut adalah hasil dari maklumat yang dikatakan diberi oleh perayu, bahawa "Pistol disimpan dalam speaker box Mini Compo itu" ("maklumat seksyen 27"). Dimahkamah dibawah, perayu menafikan pernah memberitahu PW5 atau PW7 mengenai tempat beradanya barang-barang menyalahi itu, dan telah memberi keterangan lanjut,

yang tidak dipertikaikan, bahawa rumah tersebut juga diduduki oleh teman wanitanya. Selain ini atas autoriti kes *Md Desa bin Hashim v. PP* perayu juga telah mencabar kerelaan percakapan, dan oleh itu, penerimaan masuk maklumat seksyen 27.

Tidak menjadi pertikaian bahawa *Md Desa* pada intinya memutuskan bahawa s. 27 Akta Keterangan 1950 ('Akta 1950') adalah tertakluk kepada s. 24, dan oleh yang demikian, maklumat dibawah s. 27, supaya ianya boleh diterima masuk, mestilah dibuat secara sukarela. Hakim yang bijaksana, kelihatannya, sangat meragui tentang kerelaan maklumat seksyen 27, tetapi telah memerintahkan, namun begitu, bahawa maklumat tersebut, tanpa mengira sifatnya yang tidak rela, boleh diterima masuk dalam keterangan dibawah s. 27 Akta 1950. Hakim yang bijaksana dalam keadaan tersebut telah menyabitkan perayu atas kedua-dua pertuduhan dan telah menjatuhkan hukuman mati bagi pertuduhan yang pertama.

Perayu telah merayu. Oleh yang demikian isu-isu berikut antara lain telah berbangkit untuk pemutusan mahkamah teratas, iaitu (i) samada s. 27 dikawal oleh atau tertakluk kepada s. 24; (ii) Samada ss. 24 dan 27 Akta 1950 adalah tidak berhubung kait diantara satu sama lain dan tidak bergantung kepada satu sama lain; dan (iii) samada, andainya maklumat seksyen 27 disini tidak dibuat dengan sukarela, ianya sepatutnya ditolak, demi kepentingan keadilan dan kesaksamaan.

Diputuskan:
Oleh Chong Siew Fai HB (Sabah & Sarawak)

[1] Satu-satunya keterangan yang mengaitkan perayu kepada pertuduhan kedua adalah maklumat seksyen 27 beliau. Maklumat tersebut bagaimanapun tidak menyebut langsung mengenai peluru-peluru. Ianya mengikut bahawa 51 butir peluru tersebut dijumpai dengan tidak sengaja kerana ianya berada didalam peti speaker mini compo dimana dijumpainya pistol tersebut, dan bukan berdasarkan maklumat seksyen 27. Fakta-fakta juga menunjukkan bahawa pendakwaan gagal menunjukkan diluar keraguan yang munasabah bahawa perayulah yang meletakkan 51 butir peluru di dalam peti speaker. Oleh yang demikian, sabitan kedua tidak boleh dipertahankan dan harus dimansuhkan.

[2] Selain dari kes *Vijay Kumar v. State of Himachal Pradesh*, kesemua kes lain yang disebut oleh *Md Desa*, iaitu, *Ramkishan Mithanlal Sharma & Ors v. State of Bombay, Yee Ya Mang v. PP, R v. Ramasamy* dan *Packiam & Anor v. PP* tidak menyokong penyataan bahawa s. 27 Akta 1950 dipengaruhi oleh ataupun tertakluk kepada s. 24. Tambahan pula, oleh kerana s. 24 adalah berkaitan dengan pengakuan, keputusan di *Md Desa* yang menaklukkan s. 27 kepada s. 24 tidak boleh dikait guna kepada kenyataan s. 27 jika kenyataan tersebut bukan satu pengakuan.

[3] Ia adalah suatu perkara tafsiran ss. 24 dan 27 samada s. 27 adalah tertakluk kepada s. 24. Walaubagaimanapun, ia adalah penting untuk memerhatikan, dalam hal ini, bahawa perisytiharan kehakiman berkaitan kebebasan dan kesendirian s. 27 Akta 1950, dan kedudukannya sebagai suatu kecualian kepada s. 24, adalah tertanam secara mendalam dalam undang-undang kes kita, dan telah tidak diganggu untuk berdekad-dekad.

[4] Berdasarkan perkataan-perkataan ss. 25 dan 26 Akta 1950, terdapat keperluan yang jelas untuk menentukan sifat bebas s. 27 berbanding kedua-dua seksyen tersebut. Hal yang sama, bagaimanapun, tidak terpakai kepada s. 27 dalam hubungannya dengan s. 24. Berdasarkan perkataan-perkataan ss. 24 dan 27, tidak kedapatan, dari tatabahasa seksyen-seksyen tersebut, suatu kaitan di antara mereka yang memerlukan satu penentuan samada seksyen yang satu adalah tertakluk ataupun merupakan kecualaian kepada yang lain.

[4a] Seksyen 27 Akta 1950, dalam perkataan lain, adalah berdiam atau tidak mempunyai apa-apa perhubungan dengan sifat kerelaan atau sebaliknya sesuatu maklumat itu. Perkataan-perkataan "samada maklumat bersamaan kepada suatu pengakuan atau tidak" dalam seksyen itu adalah berkaitan dengan watak maklumat itu, iaitu, samada ia adalah suatu pengakuan atau kenyataan yang tidak sampai kepada suatu pengakuan. Dengan demikian, tidak seperti s. 27 apabila dibanding dengan ss. 25 dan 26 Akta 1950, perbandingan diantara s. 27 dengan s. 24 tidak menunjukkan bahawa ia mengandungi apa-apa perkataan, atau frasa-frasa yang mengandungi atau boleh mengandungi rujukan di antara satu sama lain. Dari perkataan-perkataannya, ss. 24 dan 27 Akta 1950 berdiri secara bebas diantara satu sama lain.

[5] Jika s. 27 adalah tertakluk kepada s. 24, ianya mengikut bahawa ia adalah tertakluk kepada peruntukkan-peruntukkan lain yang sama yang terkandung di dalam enakmen-enakmen lain, seperti s. 113 Kanun Tatacara Jenayah, s. 37A Akta Dadah Berbahaya 1952, s. 75 Akta Keselamatan Dalam Negeri 1960, s. 15 Akta Mencegah Rasuah 1961 (dimansuhkan) dan s. 45 Akta Anti-Rasuah 1997. Akan tetapi, menimbang perkataan-perkataan peruntukkan enakmen-enakmen tersebut, peruntukkan-peruntukkan yang mana tidak mengandungi rujukan kepada s. 27 Akta 1950, ia berada di luar fungsi dan di luar kawasan mahkamah untuk mentafsir sebegitu. Apatah lagi apabila Mahkamah Agung di *Wai Chan Leong v. PP* telah mengisytiharkan bahawa penerimaan masuk maklumat seksyen 27 adalah berakarkan kepada "niat nyata badan perundangan" walaupun wujud ketidakserasiannya dengan s. 24 Akta 1950. Jelasnya, apa-apa penyimpangan dari pentafsiran kehakiman yang kukuh yang telah dibuat, akan menjadi suatu keputusan polisi dan sepatutnya diserahkan kepada badan perundangan.

[6] Mahkamah ini bukanlah tidak sedar akan kehendak untuk melindungi pihak-pihak tertuduh dari apa jua kemungkinan penyalahgunaan kuasa oleh anggota polis yang terlalu bersemangat apabila mereka berada di dalam kawalan polis. Malahan, mahkamah ini bersetuju sepenuhnya, sebagai suatu perkara polisi, dengan pandangan yang telah diberi oleh *Md Desa* mengenai kebaikan kesukarelaan maklumat seksyen 27.

[7] Di Malaysia Barat, berdasarkan s. 3(1)(a) Akta Undang-Undang Sivil 1956, undang-undang common England sebagaimana ditadbirkan di England pada 7 April 1957 terpakai kecuali jika peruntukan statut yang lain telah dibuat.

[7a] Mengambil kira bahawa s. 24 Akta 1950 tidak terpakai kepada maklumat seksyen 27, bahagian operatif pada permulaan s. 3(1), iaitu "Kecuali setakat peruntukkan yang lain telah dibuat atau akan selepas ini dibuat melalui apa-apa undang-undang bertulis yang berkuatkuasa di Malaysia", jelas tidak menyingkir kuasa budibicara mahkamah untuk mengetepikan pengakuan di dalam kes-kes yang sesuai.

[7b] Ianya mengikut bahawa terdapat suatu budibicara yang diberikan kepada hakim perbicaraan untuk menyingkirkan keterangan yang memudaratkan pihak tertuduh walaupun keterangan itu "secara teknikal boleh diterimamasuk". Dalam keadaan ini, di atas fakta-fakta, ia adalah penting untuk mempertimbangkan samada maklumat seksyen 27 perayu patut, demi kepentingan keadilan dan kesaksamaan, diterima masuk.

[8] Hakim perbicaraan telah menyatakan keraguan berat berkaitan kesukarelaan maklumat seksyen 27 perayu. Dengan demikian, ia adalah terbuka untuk mahkamah perbicaraan untuk menggunakan budibicara samada untuk menerima masuk maklumat itu sebagai sebahagian dari perbicaraan. Hakim perbicaraan yang bijaksana tidak menggunakan budibicara itu. Dengan demikian mahkamah ini berhak menggunakannya.

[9] Keterangan yang diperolehi secara penindasan dengan menggunakan kuasa atau bertentangan dengan kehendak tertuduh atau melalui penipuan atau melalui kelakuan yang mana pihak polis tidak patut mengambil kesempatan, akan memudaratkan tertuduh dan patut dalam budibicara mahkamah ditolak. Di sini, oleh kerana hakim bijaksana telah memutuskan bahawa maklumat seksyen 27 tidak dibuat secara sukarela, ia adalah tidak relevan. Ia bukanlah kenyataan perayu sendiri dan telah diperolehi dari perayu bertentangan dengan perlindungan dari penunjukkan jenayah diri dan ia adalah tidak adil untuk menerimanya masuk terhadap beliau. Hakim perbicaraan yang bijaksana, dengan demikian, tidak patut menerima masuk maklumat berkenaan.

[10] Dengan penolakan maklumat seksyen 27, tidak terdapat keterangan atau keterangan yang cukup untuk menyokong sabitan perayu di atas tuduhan pertama. Rayuan dengan demikian dibenarkan.

[Rayuan dibenarkan; perayu dilepaskan dan dibebaskan; sabitan-sabitan dan hukuman dibatalkan dan diketepikan.]

Cases referred to:

Chan Chwen Kong v. PP [1962] 28 MLJ 307 ***(refd)***
Chandrasekaran & Ors v. PP [1971] 1 MLJ 153 ***(refd)***
Chong Soon Koy v. PP [1977] 2 MLJ 78 ***(aff)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791 ***(aff)***
Harris v. Public Prosecutions Director [1952] 1 All ER 1044 ***(foll)***
Haw Tua Tau v. PP [1981] 1 CLJ 123 ***(refd)***
Kan Sik Fong v. PP [1961] 27 MLJ 163 ***(aff)***
Kuruma v. R [1955] 1 All ER 236 ***(foll)***
Lee Kok Eng v. PP [1976] 1 MLJ 125 ***(aff)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 ***(not foll)***
Noor Mohamed v. R [1949] 1 All ER 365 ***(foll)***
Noor Mohamed v. The King [1949] AC 182 ***(foll)***
Packiam & Anor v. PP [1972] 1 MLJ 247 ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39 ***(refd)***
PP v. Chin Moi Moi [1995] 1 SLR 297 ***(refd)***
PP v. Er Ah Kiat [1966] 1 MLJ 9 ***(aff)***
PP v. Hj Kassim [1971] 2 MLJ 115 ***(refd)***
PP v. Sandra Margaret Birch [1977] 1 MLJ 129 ***(aff)***
PP v. Toh Ah Keat [1977] 2 MLJ 87 ***(aff)***
Pulukuri Kottaya v. Emperor AIR [1947] PC 67 ***(refd)***
R v. Barker [1941] 2 KB 381 ***(refd)***
R v. Gould [1840] 9 Car & P 364 ***(refd)***
R v. Hunt [1987] AC 352 ***(refd)***
R v. Ramasamy [1965] AC 1 ***(refd)***
R v. Sang [1980] AC 402 ***(foll)***
Ramkishan Mithanlal Sharma & Ors v. State of Bombay AIR [1955] SC 104 ***(refd)***
Rauf Hj Ahmad v. PP [1950] 16 MLJ 190 ***(refd)***
Sum Kum Seng v. PP [1981] 1 MLJ 244 ***(aff)***
Tan Buck Tee v. PP [1961] 27 MLJ 176 ***(refd)***
Tan Geok Kwang v. PP [1949] 15 MLJ 203 ***(foll)***
The Queen v. Murugan Ramasamy [1965] AC 1 PC ***(foll)***
Thurtell & Hunt's Trials [1924] Notable British Trials 55 pp 144-145 ***(refd)***
Vijay Kumar v. State of Himachal Pradesh [1978] Crim LJI 1619 ***(refd)***
Wai Chan Leong v. PP [1989] 2 CLJ 1168 ***(aff)***
Woolmington v. Director Public Prosecutor [1935] AC 462 ***(refd)***
Yau Heng Fang v. PP [1985] 2 CLJ 22 ***(refd)***
Yee Ya Mang v. PP [1972] 1 MLJ 120 ***(refd)***

Legislation referred to:
Anti Corruption Act 1991, s. 45
Civil Law Act 1956, s. 3(1)(a)
Criminal Procedure Code, ss. 112(ii), (iii), (iv), 113
Dangerous Drugs Act 1952, ss. 37A(b), 75
Evidence Act 1950, ss. 24, 25, 26, 27
Evidence Ordinance 1950, s. 27
Federal Constitution, arts. 5(1), 8(1)
Internal Security Act 1960, ss. 57(1)(a), (b), 75
Prevention of Corruption Act 1961, s. 15

Code of Criminal Procedure 1938 [Ceylon], s. 122(3)
Constitution of Singapore [Sing], arts. 9(1), 12(1)
Criminal Procedure Code 1861 [India], s. 150
Evidence Act 1872 [India], ss. 24, 25, 26, 27
Evidence Ordinance 1938 [Ceylon], s. 27
Police and Criminal Evidence Act 1984 [UK], ss. 76(5), 82
Taxes Management Act 1970 [UK], s. 105

For the appellant - Karpal Singh (Jagdeep Singh Deo & Gobind Singh Deo with him); M/s Karpal Singh & Co
For the respondent - Azahar Mohamed DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 57-1 of 1988]

*[**Editor's note:** The two appeals Mohd Affandi Abdul Rahman & Maznah Ismail v. PP (Criminal Appeal No: C-05-15-95) and Juraimi Husin v. PP (Criminal Appeal No: C-05-16-95) were heard together and dismissed by the Court of Appeal. The judgment of the Court of Appeal was reported in [1998] 2 CLJ 383.]*

Reported by WA Sharif

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

The appellant was initially charged in the High Court of Malaya in Shah Alam with three charges under the Internal Security Act 1960. As he had been acquitted and discharged of the 3rd charge, nothing more need be said about it. The 1st and the 2nd charges read:

(1) Charge 1:

> Bahawa kamu pada 24hb. Jun 1988, jam lebih kurang 7.00 petang bertempat dirumah No. 65, Jalan SJ 32, Taman Selayang Jaya, Selayang, di dalam Daerah Gombak, didalam Negeri Selangor Darul Ehsan iaitu satu Kawasan Keselamatan sepertimana yang diistiharkan oleh Yang DiPertuan Agong mengikut pengistiharan P.U.(A) 148 bertarikh 15hb. Mei, 1969, tanpa alasan yang sah telah ada didalam milik kamu:

i) sepucuk Revolver jenis SMITH & WESSON .38 MOD 36 2" No. siri 539639.

ii) sepucuk Revolver jenis SMITH & WESSON .38 MOD 10-5 2" No. siri 46597;

iii) sepucuk Revolver jenis COLT COBRA .38 No. siri 5/1013

tanpa kuasa yang sah dan dengan itu kamu telah melakukan satu kesalahan dibawah sek. 57(1)(a) Akta Keselamatan Dalam Negeri 1960, dan boleh dihukum dibawah sek. 57(1) Akta yang sama.

(2) Charge 2:

Bahawa kamu pada 24hb Jun 1988, jam lebih kurang 7.00 petang bertempat dirumah no. 65, Jalan SJ 32, Taman Selayang Jaya, Selayang, didalam Daerah Gombak, didalam Negeri Selangor Darul Ehsan, iaitu satu Kawasan Keselamatan sepertimana yang diistiharkan oleh Yang DiPertuan Agung mengikut pengistiharan P.U.(A) 148 bertarikh 15hb. Mei 1969, tanpa alasan yang sah telah ada didalam milik kamu amunisi iaitu sejumlah 51 butir peluru hidup jenis .38 special, tanpa kuasa yang sah dan dengan itu kamu telah melakukan satu kesalahan dibawah sek. 57(1)(b) Akta Keselamatan Dalam Negeri 1960 dan boleh dihukum dibawah sek. 57(1) Akta yang sama.

At the close of the case for the prosecution on 19 February 1992 the learned trial judge called for the defence respecting the 1st and the 2nd charges. The appellant elected to give sworn evidence and called three other witnesses to support his defence. On 12 June 1993, the learned trial judge found the appellant guilty of both charges and sentenced him to death in respect of the 1st charge. Sentencing on the 2nd charge was suspended. Against the said convictions and sentence, the appellant appealed to the Federal Court.

The Prosecution's Case

The case for the prosecution rests mainly on the evidence of two key witnesses, PW5 (ASP Hanafiah bin Mohd Nor) and PW7 (Detective Constable Loh Choo Haw). Their evidence revealed that on 24 June 1988, PW5 interrogated the appellant with the help of an interpreter, PW7. The appellant as well as four others had earlier been arrested on suspicion of committing armed robbery in Cheras, Selangor.

In the course of interrogating the appellant on 24 June 1988, PW5, through PW7 who spoke to the appellant in a mixture of Teochew, Hokkien and Cantonese, asked the appellant where he had kept the pistols. The appellant's answer, likewise translated, was "Saya ada simpan tiga pistol dalam rumah saya di Selayang". PW5 further asked the appellant, through PW7, "Boleh tunjuk?" and the appellant allegedly answered, "Boleh". Immediately thereafter

a police party headed by PW5, including PW7, took the appellant to the appellant's rented house at No. 65, Jalan SJ 32, Taman Selayang Jaya, Selayang, Selangor. According to both PW5 and PW7, when the police party and the appellant reached the house at about 7pm that same day, they discovered that the front door was locked. PW5 testified that, with the appellant's permission, one Detective Corporal Raja Kopal forced open the front door. As soon as they entered the house, PW5 asked the appellant, through PW7, to show him where the pistol was kept. The appellant gesticulated with his mouth in the direction of a mini compo radio on the floor of the sitting room. Then, PW5 asked the appellant "Dimana pistol tersebut?" The appellant answered, "Pistol di simpan dalam speaker Box Mini Compo itu." Both the question and answer were given through the interpretation of PW7.

In the appellant's presence, PW5 proceeded to open the left speaker of the said mini compo with the assistance of Detective Corporal Raja Kopal and found inside it three pistols and 51 rounds of ammunition (the subject matters of the 1st and the 2nd charges respectively). At the time of the discovery, all the three pistols were loaded with ammunition. PW5 testified that the appellant's answer in response to the interrogation in the latter's rented house which led to the discovery of the incriminating articles was reduced by him (PW5) into writing in his note-book. (Ex. P19)

The appellant was then taken back to the police headquarters where he together with the exhibits seized were handed over to the investigating officer of this case, PW10 (Inspector Mohd. Husin bin Mohd. Yusuf).

At the trial, an armoury officer, PW3 (ASP Syed Mustaffa bin Syed Nordin) also testified that after receiving the exhibits in this case, ie, the arms and ammunition from PW10, he test fired all the three revolvers and found them to be in good working condition ie, serviceable. Likewise the test he conducted on the ammunitions showed that they were also live.

Thus, in the main, the case for the prosecution rested on the evidence of PW5 and PW7 who testified on the discovery of the incriminating firearms and ammunition in the appellant's rented house as a result of the information given by the appellant himself during his interrogation by PW5.

The Appellant's Defence

In his sworn testimony, the appellant said he was arrested on 23 June 1988 when he went to the house of a friend, Lim Bak Hai. At the time of his arrest one Wong Weng Fook alias Shan Tung and Lim had already been arrested, and an hour later another two suspects, Pui Kia and Teik Lee, were also brought to Lim's house in handcuffs.

The appellant claimed that one or two days after his arrest at about 6pm, whilst being blindfolded he was brought together with Shan Tung to his rented house. After the blindfold on him was taken off, he saw laying out on the floor of the sitting room pistols and ammunition. After that, he was taken back to the police headquarters at Shah Alam.

The appellant denied ever telling PW5, through PW7, that he had kept the three pistols in his house in Selayang or that he had agreed to show PW5 where he kept them. He also denied showing them where he kept the pistols by gesticulating with his mouth in the direction of the mini compo and telling PW5 that the pistols were kept in the speaker box of the mini compo. The appellant said he had no knowledge of the firearms and the ammunitions seized from the house and had never seen the said mini compo in his sitting room before. He alleged that the mini compo belonged to Shan Tung, who, according to him, occasionally stayed in the same house with him.

Under cross-examination, the appellant said only he and his girlfriend were the permanent occupants of the house but a number of his other friends, including Shan Tung, sometimes came and stayed there.

The evidence of a defence witness DW3, Lim Bak Hai, is of some significance. DW3 was arrested together with the appellant and the others. According to DW3, after their arrests and whilst the police were searching his house, Shan Tung, who was seated next to him, told him not to worry as the incriminating articles were in the house of the appellant. DW3 also claimed that after his arrest he was tortured by the police and that since he could not stand the beatings, he had told the police that the pistols were in the appellant's house, as revealed to him by Shan Tung. DW3 also said he gave the police the address of the appellant's rented house.

In summary, it could be said that the gist of the appellant's defence was to pin the ownership of the said incriminating exhibits and the blame on his friend, Shan Tung, who, he claimed, occasionally stayed in his rented house.

Learned Trial Judge's Judgment

In his judgment the learned trial judge acknowledged that the evidence linking the appellant to the incriminating exhibits was the statement made by the latter under s. 27 of the Evidence Act 1950 to PW5 through the interpretation of PW7. The learned trial judge, despite the challenge by the defence, accepted the evidence of PW5 and PW7 and found that the statements were recorded by PW5 in his note book, exh. P19 and were made by PW5 personally.

On the said evidence, the learned trial judge found that the prosecution had proved its case against the appellant in respect of the 1st and the 2nd charges beyond reasonable doubt.

The learned trial judge disbelieved the defence story that Shan Tung stayed in the said house and that the mini compo (exh. P21) belonged to him. The learned trial judge accepted the evidence of PW5, which he found to be supported by PW7 and exh. P19, that the appellant had admitted keeping three pistols in the rented house and had informed PW5, by words and gesture, that the pistols were kept in the speaker box of the mini compo. The learned trial judge rejected the defence version that DW3 had informed the police about the pistols being in the appellant's house some 4½ hours prior to the appellant making known of the whereabouts of the pistols.

The Appeal

The appeal was centered upon the scope and application of s. 27 of the Evidence Act 1950 in relation to the admissibility of the information given by the appellant to PW5 as to the whereabouts and the location of the three pistols in the rented house.

For the appellant, Mr. Karpal Singh contended that the information given by the appellant leading to the discovery of the pistols and the ammunition (for brevity, "the section 27 information") ought to have been excluded in evidence. Reliance was placed on *Md. Desa bin Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350 FC which held, *inter alia,* that in order to render an information under s. 27 of the Evidence Act 1950 admissible, it must have been made voluntarily, and that upon a challenge being made promptly respecting the voluntariness of the information, the trial judge must determine the issue upon the *voire dire*. Counsel also sought to distinguish *Mohd. Affandi bin Abdul Rahman v. PP* and *Maznah bte Ismail and Anor v. PP* CA Nos C-05-15-95 and 45-1-94 (unreported) where the Court of Appeal held that timely objection must be raised if it were intended to challenge the voluntariness of a section 27 information, and that it was too late to raise such issue at the appellate stage. Counsel pointed out that in our instant case, since the learned trial judge had, on his own accord, entertained doubt as to the voluntariness of the appellant's section 27 information, the learned trial judge ought to have ruled the information inadmissible. It is opportune at this stage to note that the prosecution founded its convictions on both charges on the s. 27 statement without which there would have been no case against the appellant.

For the respondent, the learned Deputy Public Prosecutor submitted firstly, that voluntariness was not a condition under s. 27 and secondly, that s. 27 was intended to be an exception to the prohibitions imposed by ss. 24, 25 and 26 of the Evidence Act 1950. Accordingly, he contended that even if the information was given involuntarily, it would still be admissible under s. 27. As regards *Md. Desa, supra,* the learned Deputy Public Prosecutor contended that that case was distinguishable on the facts and that the remarks of the

Federal Court by Gopal Sri Ram JCA on the need to prove voluntariness of a section 27 information before admitting it, was *obiter*.

To facilitate easier understanding of the arguments, we reproduce below ss. 24 and 27 of the Evidence Act 1950, skipping ss. 25 and 26 thereof which are not relevant to the issue in hand.

Section 24 provides:

> A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

Section 27 provides:

> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.
>
> (2) (Repealed).

In *Md. Desa, supra,* Md. Desa was charged with two offences of having in his control a revolver and seven bullets under s. 57(1)(a) and (b) of the Internal Security Act 1960 respectively. During the interrogation after his arrest, he revealed, *inter alia,* that he had kept the pistol covered with grass by a river-bank at Hutan Aji, Perlis, which he agreed to show to the police ("the first statement"). The interrogating officer wrote down the statement. Shortly thereafter, Md. Desa led the police to the place mentioned by him and pointed to a spot, saying, "Di situ saya simpan beg yang mengandungi pistol." (the second statement) He then parted some of the bushes and the interrogating officer found, among them, a black bag containing a plastic bag in which the pistol and the bullets were found.

Upon objection by counsel for Md. Desa, the trial judge of the High Court allowed certain words in the first statement to be expunged. Objection to admit the second statement in evidence was, however, overruled, and the second statement was admitted.

At the close of the prosecution's case, defence was called. Md. Desa gave sworn evidence. His defence was a complete denial. He denied having made the first statement and having led the police to discover the above offending exhibits. He said that he was taken to the scene and was forced to pose for several photographs to be taken.

The defence was rejected and Md. Desa was convicted of the two charges and sentenced according to law.

On appeal to the Federal Court, the convictions were quashed and the sentence, set aside. It was held that before admitting a statement under s. 27 of the Evidence Act 1950, whether the statement amounted to a confession or not, it must, upon objection as to its admissibility being promptly taken by the defence in the proceedings, firstly be proved that the statement had been made voluntarily.

Reverting to the submission of the learned Deputy Public Prosecutor that *Md. Desa supra,* is distinguishable on its facts and that the comment of Gopal Sri Ram JCA on the operation of s. 27 was *obiter,* we would agree with the former part of the submission but not the latter. As may be seen from the above, the conviction in *Md. Desa, supra,* rested substantially on the s. 27 statement, the admissibility of which was objected to by the defence at the trial and the objection was overruled by the learned trial judge. Therefore, the issue of s. 27 formed the crux of the prosecution's case in *Md. Desa, supra.* We would, however, agree with the Deputy Public Prosecutor that *Md. Desa supra,* is distinguishable in that in our present case under appeal, the learned trial judge, on his own volition, entertained doubt as to the voluntary nature of the appellant's section 27 information, and yet, despite that, ruled that the information was admissible in evidence under s. 27 of the Evidence Act 1950 irrespective of its voluntary character or otherwise.

2nd Charge – Possession Of 51 Live Bullets

We consider it convenient at this stage to dispose of the 2nd charge of possession of 51 live bullets upon which the appellant was convicted. On the facts and circumstances of this case, there is, in our view, no or insufficient evidence to sustain the conviction. No dissertation is required of the firmly established principle that the burden of proving the guilt of an accused lies on the prosecution and remains there throughout the trial *Woolmington v. Director Public Prosecutor* [1935] AC 462, *R v. Hunt* [1987] AC 352 HL; *Chan Chwen Kong v. PP* [1962] 28 MLJ 307 CA; *Tan Buck Tee v. PP* [1961] 27 MLJ 176 CA @ 179; *Yau Heng Fang v. PP* [1985] 2 MLJ 335 SC @ 339-340. As stated earlier in this judgment, the only evidence from the prosecution purporting to connect the appellant to the 2nd charge is his section 27 information. The information, however, made no mention at all of the bullets. Factually, the 51 bullets (inclusive of the comparative few inside the pistol chambers) were accidentally discovered because they happened to be inside the same speaker box of the mini-compo in which the pistols were found and not as a result of any section 27 information to that effect. Further, it was not disputed that the appellant's girlfriend stayed with him in the said

house. Therefore, on the evidence it cannot be said to have been established beyond reasonable doubt that it was the appellant who placed the 51 bullets inside the speaker box. The conviction on the 2nd charge is accordingly quashed. No order for setting aside sentence is necessary as no sentence on the charge had been passed.

Sections 24 and 27 Of The Evidence Act 1950

Delivering the judgment of the court in *Md. Desa, supra*, Gopal Sri Ram JCA said (pp. 359-360):

> Fifthly, in a number of Indian cases it has been held that the rule permitting admissibility contained in s. 27 is an exception to the prohibition appearing in the two sections that immediately precede it but does not qualify the all pervading qualification enacted in s. 24: see, *Ramkishan Mithanlal Sharma & Ors v. State of Bombay* AIR [1955] SC 104; *Vijay Kumar v. State of Himachal Pradesh* [1978] Crim LJI 1619. The former decision was applied in *Yee Ya Mang v. PP* [1972] 1 MLJ 120. The decisions of the Privy Council in *R v. Ramasamy* [1965] AC 1 at p. 13 and of Chang Min Tat J (as he then was) in *Packiam & Anor v. PP* [1972] 1 MLJ 247 appear to support the proposition. Put in another fashion, the principle is that ss. 25 and 26 are subject to s. 27 but all these three sections are governed by and are subject to s. 24.
>
> We have no difficulty in affirming the correctness of the proposition as stated in the Indian cases to which we referred a moment ago. Having regard to the language of each of the sections which we have set out and the sequence in which they have been legislatively framed, it is abundantly clear, in our judgment, that in order for a confession or other statement or information to qualify for admission under s. 27, it must have been made voluntarily. A discovery made in consequence of a confession extracted by illegitimate means in the sense described in s. 24 is inadmissible. When a challenge is taken as to the voluntariness of the information, it is imperative for a trial judge to determine that issue upon the *voire dire.*

In *Ramkishan Mithanlal Sharma & Ors v. State of Bombay, supra*, Ramkishan and some others were convicted by the Sessions Court of Bombay of the offence of dacoity, using deadly weapons whilst committing the offence, and also of the offence of murder. Their appeals to the High Court of Bombay having been dismissed, they appealed to the Supreme Court by special leave.

One of the issues raised in the appeal was the admission of evidence under s. 27 of the Indian Evidence Act. The relevant evidence of the investigation officer was that the 1st accused, Ramkishan, had made a certain statement in consequence of which he (the investigation officer) took the 1st accused to a place where the 1st accused pointed out one Baliram who at the instance of the 1st accused dug out from a mud house a tin box containing three revolvers and two tins containing live cartridges. Arguments turned on the phrases "in

consequence of a certain statement made by accused 1" and "at the instance of accused 1" in relation to s. 27 of the Indian Evidence Act. In the result it was held on the facts that the operation of s. 27 was not attracted and that the evidence was admissible against accused 1. Bhagwati J in the course of his discussion on s. 27 said (at p. 115):

> Section 27, is an exception to the rules enacted in sections 25 and 26 of the Act which provide that no confession made to a police officer shall be proved as against a person accused of an offence and that no confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Where however any fact is discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, that part of the information as relates distinctly to the fact thereby discovered can be proved whether it amounts to a confession or not.

On the phrase "whether it amounts to a confession or not," Bhagwati J continued (p. 116) relying on *Pulukuri Kottaya v. Emperor* AIR [1947] PC 67:

> The expression "whether it amounts to a confession or not" has been used in order to emphasise the position that even though it may amount to a confession that much information as relates distinctly to the fact thereby discovered can be proved against the accused. The section seems to be based on the view that if a fact is actually discovered in consequence of information given some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. But clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. – '*Pulukuri Kottaya v. Emperor*', AIR [1947] PC 67(k).

The appeal, therefore, did not decide on the inter-relation of ss. 24 and 27 of the Evidence Act.

In *Vijay Kumar v. State of Himachal Pradesh, supra*, Vijay Kumar was convicted of murder and robbery, and a co-accused was convicted of robbery. There was evidence that Vijay Kumar made a statement leading to the discovery of a sickle said to have been used to commit the murder. The police investigation officer, however, was found to have induced Vijay Kumar into making it. On appeal, the relation between ss. 24 and 27 of the Indian Evidence Act (1 of 1872) was in issue. For the respondent, the Advocate-General contended that s. 27 served as a proviso to s. 24, 25 and 26 of the said Act and hence even if a s. 27 statement leading to discovery was procured by the police under inducement, threat, promise or violence, the statement was saved if it fell within the provisions of s. 27 even though the provisions of s. 24 appeared to have been infringed. (para. 36 at p. 1622). Delivering the judgment of the court, Mehta Actg. CJ said:

> A close analysis of all these above referred four Sections of the Evidence Act will show that s. 27 acts as a proviso only to ss. 25 and 26 and not to s. 24. (Para. 41 at p. 1623)

After considering the four sections, Mehta Actg. CJ further said:

> Thus, s. 27 works as a proviso to both the preceding ss. 25 and 26. It has no connection with s. 24 and it was put in the scheme only because of the special provisions contained in ss. 25 and 26. (para. 48 at p. 1623)

The learned acting CJ then considered the legislative history of ss. 25, 26 and 27 and observed:

> Thus, even without availing of the aid of other reported decisions on this question, we find, on the simple analysis of ss. 24 to 27, and the historical background under which ss. 25, 26 and 27 were brought in the Evidence Act that s. 27 cannot be said to be controlling the provisions of s. 24 of the Indian Evidence Act. (para. 57 at p. 1624)

A number of Indian decisions (some conflicting) were then discussed after which Mehta Actg. CJ concluded:

> On consideration of all the cases referred to above, and for the reasons already given, we are of the opinion that s. 27 controls only the two preceding sections, namely, ss. 25 and 26, and not s. 24 of the Evidence Act. (para. 74 at p. 1629)

Mehta Actg. CJ then went on to state:

> even apart from section 24, section 27 of the Evidence Act contemplates only those statements of the accused which are voluntary in character. (p. 1629 para. 75).

He subsequently continued:

> section 24 would have operation in spite of the existence of section 27 of the Evidence Act.

and further stated that:

> even if section 24 of the Evidence Act was not on the statute book this statement being not of the accused should be taken out of consideration. (p. 1629 para. 76).

We shall revert to this later.

Briefly, while *Ramkishan Mithanlal Sharma v. State of Bombay supra,* decided that s. 27 was a proviso or an exception to ss. 25 and 26 without adverting to s. 24, *Vijay Kumar v. State of Himachal Pradesh, supra,* held that s. 27 had no connection with (paras. 48) and did not control s. 24 (para. 74).

Yee Ya Mang v. PP, supra, did not deal with the inter-relation between s. 27 and s. 24. *Ramkishan Mithanlal Sharma & Ors v. State of Bombay, supra,* was cited but only in relation to ss. 25, 26 and 27.

The ratio in *R v. Ramasamy, supra,* is on the effect of s. 122(3) of the Code of Criminal Procedure 1938 of Ceylon on s. 27 of their Evidence Ordinance 1938. There the Privy Council did not rule that s. 27 was subject to the Ceylonese provisions equivalent to our s. 24, nor for that matter, to our ss. 25 and 26, though the provisions were discussed.

As for *Packiam & Anor v. PP, supra,* it, likewise, did not deal with the inter-relation between ss. 24-26 and s. 27. There, the purported s. 27 statement of the 2nd appellant in which he said that the stolen property belonged to the 1st appellant, Packiam, who left it with him for safekeeping, was held inadmissible in evidence since it was not limited to and did not relate distinctly to the fact of discovery.

In short, it is a matter of construction of ss. 24 and 27 as to whether the latter is subject to the former. Apart from *Vijay Kumar v. State of Himachal Pradesh, supra,* we feel constrained to hold that all the other cases cited in the above-quoted passages in *Md. Desa, supra,* do not support the proposition. It also appears that the decision in *Md. Desa, supra,* subjecting s. 27 to s. 24 cannot have application to a s. 27 statement if that statement does not amount to a confession since s. 24 relates to confessions.

Section 27 – Legislative History

The origin of s. 27 of our Evidence Act 1950 may be traced to s. 150 of the Indian Criminal Procedure Code (Act XXV) of 1861 which was subsequently amended by Act VIII of 1869. The said amended s. 150 of the Indian 1861 Code was transferred to the Evidence Act of India 1872 as s. 27. Except for the words "Provided that" appearing at the commencement of the Indian s. 27, our s. 27 is substantially the same as the Indian provision.

Section 27 of the Indian Evidence Act was said to have been adopted from that part of the development in English Common law to the effect that those parts of a confession made by an accused leading to the subsequent discovery of facts could be admitted in evidence even though the confession was not voluntarily made, the rationale being that the reliability of the information backed by subsequent discovery justified such admission (see *R v. Gould* [1840] 9 Car & P 364, 173 ER 870, *Thurtell & Hunt's Trials* [1924] Notable British Trials 55 at pp. 144-145). In *R v. Ramasamy* [1965] AC 1 Viscount Radcliffe said (pp. 14-15):

> The principle embodied in section 27 has always been explained as one derived from English common law and imported into the criminal law of British India by the legislators of the mid-nineteenth century. It can be traced in English law as early as the late eighteenth century ...

In England, however, s. 76(5) of the Police and Criminal Evidence Act 1984 prohibits the admission of such a statement by an accused unless "evidence of how it was discovered is given by him or on his behalf."

Central Issue

Is s. 27 of the Evidence Act 1950 subject to s. 24 thereof? This is purely a matter of construction of the said two sections.

Prior to *Md. Desa, supra,* the Malaysian courts had persistently held to the effect that s. 27 was not subject to s. 24 of the Evidence Act. In other words, once an information is proved to be within the province of s. 27, the trial court would admit it in evidence (See eg, *Lee Kok Eng v. PP* [1976] 1 MLJ 125 FC; *PP v. Sandra Margaret Birch* [1977] 1 MLJ 129; *PP v. Toh Ah Keat* [1977] 2 MLJ 87 (caution not administered under s. 113 of the Criminal Procedure Code); *Sum Kum Seng v. PP* [1981] 1 MLJ 244 FC; *Wai Chan Leong v. PP* [1989] 2 CLJ 1168; [1989] 3 MLJ 356 SC (drug trafficking case – no caution administered under s. 37A(b) of Dangerous Drugs Act 1952); *Choo Yoke Choy v. PP* [1992] 2 MLJ 632 SC) notwithstanding that the said information might not have been given voluntarily. (See eg, *PP v. Er Ah Kiat* [1966] 1 MLJ 9; *Chandrasekaran & Ors v. PP* [1971] 1 MLJ 153; *Chong Soon Koy v. PP* [1992] 4 CLJ 1791; [1977] 2 MLJ 78 FC)

We propose to refer to the dicta or passages in some of the cases cited above:

In the Federal Court appeal of *Lee Kok Eng v. PP* [1976] 1 MLJ 125, objection was taken on the admission of certain evidence. Gill Ag. LP in delivering the judgment of the court with Ali Ag. CJ (Malaya) and Wan Suleiman, FJ as members, said (at p. 127):

> All this was directed to the information which the appellant gave to ASP Ariffin in relation to the discovery of money both in Penang and in Rawang, the car number plates and the shoe box. In our judgment all such evidence was admissible under section 27(1) of the Evidence Act, 1950.

In *Chong Soon Koy v. PP* [1977] 2 MLJ 78 FC the appellant gave certain information that led to the discovery of the offensive weapon and the ammunition. The information was given to a police personnel, one Mr. Ong Thye Peng who recorded the accused's statement under caution. The appeal proceeded on the basis that the cautioned statement should not have been admitted. The Federal Court comprising of Suffian LP, Gill CJ (Malaya) and Wan Suleiman FJ held that the information supplied by the appellant relating

to the discovery of the firearm and the ammunition was admissible in evidence. Delivering the judgment of the court, Suffian, LP, applying *Pulukuri Kotayya v. Emperor* 74 1A 65 PC said (at p. 79):

> In view of the above authority all the evidence of Mr Ong's which we have reproduced is admissible and that evidence alone, apart from the cautioned statement is enough to justify the verdict arrived at by the learned trial judge.

In *Sum Kum Seng v. PP* [1981] 1 MLJ 244 FC the information supplied by the appellant leading to the discovery of the offensive weapons was in the form of an indirect speech. Delivering the judgment of the court, Chang Min Tat FJ while expressing the desirability of recording the actual words used by an accused person, relied on the *The Queen v. Murugan Ramasamy* [1965] AC 1 PC and said: (at p. 245)

> It is clear and beyond argument that the statement of the accused ... was the information supplied by the accused that had been the cause of the proven discovery. It was a statement that was clearly admissible, unless it offended against some other statutory provision that would bar its admission.

Chandrasekaran & Ors v. PP [1971] 1 MLJ 153 is a corruption case. The cautioned statement of the appellant was ruled inadmissible in evidence on the ground that it had been obtained by compulsion. However, a portion of the statement was admitted by invoking s. 27 of the Evidence Ordinance 1950. On appeal, its admissibility was in issue. Raja Azlan Shah J (as he then was) said: (at p. 158)

> Section 27 is a concession to the prosecution. It is the express intention of the legislature that, even though such a statement is otherwise hit by the three preceding sections *viz.* sections 24-26 of the Evidence Ordinance, any portion thereof is nevertheless admissible in evidence if it leads to the discovery of a relevant fact. The reason is that, since the discovery itself provides the acid test, the truth of the statement that led to the discovery is thereby guaranteed. Admissibility of evidence under section 27 is in no way related to the making of the confession; rather, such evidence is admitted on clear grounds of relevancy as directly connecting the accused with the object recovered. (See *Public Prosecutor v. Er Ah Kiat* [1966] 1 MLJ 9). If a statement which would otherwise be hit by section 24 of the Evidence Ordinance is not excluded under section 27, a *fortiori* a statement which would otherwise be hit by section 15 of the Corruption Act cannot be excluded under section 27 of the Evidence Ordinance, because a statement made under section 15 of the Corruption Act is in the nature of one made under section 24 of the Evidence Ordinance.

In *Wai Chan Leong v. PP* [1989] 3 MLJ 356 the Supreme Court comprising of Mohamed Azmi, Ajaib Singh and Gunn Chit Tuan SCJJ likewise accepted that s. 27 of the Evidence Act 1950 is an exception to, *inter alia,* s. 24 thereof. In the judgment of the court, Gunn Chit Tuan SCJ said (at p. 358):

> ... as s. 27 is an exception to the prohibition imposed by the preceding ss. 24, 25 and 26 of the Evidence Act, it should be strictly construed and applied.

Wai Chan Leong v. PP [1989] 3 MLJ 356 SC was applied in *Choo Yoke Choy v. PP* [1992] 2 MLJ 632 where, delivering the judgment of a differently constituted Supreme Court comprising of Harun Hashim, Mohamed Yusoff SCJJ and Anuar J, Anuar J said (at p. 640):

> Under s. 27 of the Evidence Act, 1950, a statement or information or so much of the information that led to the discovery of the object is admissible. Therefore the statement or information by the appellant that led to the discovery of the drugs in the kitchen is admissible under this provision of the Evidence Act, 1950.

It will thus be seen from the judicial pronouncements that the independence and distinctiveness of s. 27 of the Evidence Act 1950 and its being regarded as an exception to s. 24 thereof are deeply rooted in our case-law, and so far as we are aware, has stood unchallenged for decades.

Next, having regard to the wordings of ss. 24 and 27, there is, purely by reason of the language of the two sections alone, no nexus necessitating a determination as to whether one section is subject to or exception to the other. To illustrate, s. 25 of the Evidence Act 1950 prohibits (subject to certain exceptions which are of no relevance for our purpose) the use of a confession made to a police officer below the rank of inspector and s. 26 disallows proof of a confession made by a person in the custody of a police officer whereas s. 27 permits proof of information, be it amounting to a confession or otherwise, given by an accused in the custody of a police officer. There clearly is a necessity to determine the independent nature or otherwise of s. 27 as against ss. 25 and 26. The same, however, cannot be said of s. 27 in relation to s. 24. Section 27 is silent as to or bears no ligature to the voluntary nature or otherwise of the information. The words "whether the information amounts to a confession or not" in s. 27 relates merely to the character of the information ie, whether it is a confession, or a statement falling short of a confession. In other words, unlike s. 27 when compared with ss. 25 or 26 of the Evidence Act 1950, a comparison of s. 27 and s. 24 does not show that they contain any words or phrases bearing or capable of bearing any reference to one another. From the wordings in the two sections, they stand independently of each other.

Furthermore, if s. 27 were held subject to s. 24, then, logically, it would also be held to be subject to other provisions to the like effect or of similar nature as the said s. 24 contained in other enactments eg, s. 113 of the Criminal Procedure Code, s. 37A of the Dangerous Drugs Act 1952, s. 75 of the Internal Security Act 1960, s. 15 of the Prevention of Corruption Act 1961 (repealed

with effect from 8 January 1998), s. 45 of the Anti-Corruption Act 1991. In that case, quite apart from running counter cases like *PP v. Sandra Margaret Birch, supra,* and *PP v. Toh Ah Keat, supra,* one section in an Act (ie, s. 27 of the Evidence Act 1950) would be held subject to another section in a **different** Act (eg, s. 113 of the Criminal Procedure Code, and provisions to the like effect in other Acts). Having regard to the wordings of those provisions in other enactments, which provisions bear no reference to s. 27 of the Evidence Act 1950, it would be beyond the function and outside the province of the court so to interpret. Moreover, in *Chandrasekaran & Ors v. PP* [1971] 1 MLJ 153 at 158, Raja Azlan Shah J (as he then was) has attributed the admissibility of section 27 information in evidence to "the express intention of the legislature", despite its apparent incompatibility with s. 24 of the Evidence Act 1950. (The passage is also quoted in the earlier part of this judgment). Yong Pung How CJ (Singapore) in *PP v. Chin Moi Moi* [1995] 1 SLR 297 at 304 adopted the passage which was accepted by our Supreme Court in *Wai Chan Leong v. PP* [1989] 2 CLJ 1168; [1989] 3 MLJ 356, and said that this would also represent the position in Singapore. If it were indeed the intention of the legislature that s. 27 is an independent section, – ie, that so long as the evidence constitutes "information" under s. 27 relating to facts thereby discovered, it is admissible without the necessity of making reference to s. 24 of the same Act, or s. 113 of the Criminal Procedure Code (*PP v. Sandra Margaret Birch, supra,* and *PP v. Toh Ah Keat, supra,*) or sections with similar effect in other enactments – then all the more reason that any change to clarify the grey area in the law must be left to the legislature.

We are not unaware of the desirability of protecting accused persons against any possible misuse of power by overzealous police personnel whilst under police custody. As Abdul Hamid Omar LP observed in *Pang Chee Meng v. PP* [1992] 1 MLJ 137 @ 141:

> ... we are firmly of the view that in invoking s. 27 the courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of this section, which is so vulnerable to abuse.

Indeed, we are in complete agreement, as a matter of policy, with the view expressed in the judgment of this court in *Md. Desa, supra,* of the desirability as to the voluntariness of section 27 information.

However, due to the lack of language-nexus between s. 27 on the one hand and s. 24 and comparable provisions in other enactments on the other hand, the apparent intention of the legislature, and the long line of past decisions of our courts not a few of which were from eminent members of the appellate and the highest courts, any departure from the entrenched judicial interpretation laid down in the above quoted and other numerous cases would be a policy decision and should, in our view, be left to the legislature.

Involuntary Section 27 Information – Admissibility

However, that is not the end of the matter. On the facts of this case, it is, in our view, pertinent to consider whether the section 27 information of the appellant ought, in the interest of justice and in fairness, to have been admitted.

The facts and circumstances giving rise to this question are these. In the course of the trial, the defence took objection to the admissibility of a cautioned statement recorded from the appellant on 30 June 1988. A trial-within-the-trial was held at the end of which the cautioned statement was ruled inadmissible for not having been voluntarily made. The learned trial judge was also highly suspicious as to the voluntariness of the section 27 information given on 24 June 1988. He entertained grave doubt that the appellant would have told the police about the pistol if he (the appellant) had not been tortured, threatened or induced. In fact, the learned trial judge said that there was great possibility that the appellant had been tortured whilst in police custody. Having taken the view that the information was not voluntarily made, should it be admitted?

In this regard the following passages in the judgment in *Vijay Kumar v. State of Himachal Pradesh supra,* are of great assistance. There Mehta Actg. CJ said: (pp. 1629-1630 paras. 75-76.)

> We are further of the opinion that even apart from s. 24, s. 27 of the Evidence Act contemplates only those statements of the accused which are voluntary in character. It need not be emphasised that if the statement in question is not voluntary and is procured by inducement or threats or by the use of third degree methods, it ceases to be the statement of the accused, and if it ceases to be the statement of the accused it is difficult to comprehend how s. 27 would be of any help, because that section makes reference only to the statements which are made by the accused and not by other persons.
>
> If it is held that the Police can procure a disclosure statement from the accused under inducements and threats and even by resorting to third degree methods, then it would be easy for an unscrupulous Police Officer, who has a prior knowledge about the place of concealment of an article which is used during the commission of the offence, to obtain the required statement from the accused who is in his custody and then to utilise it against him during the course of the trial. Such a situation is obnoxious to judicial conscience. If resort can be had to compulsion or inducement in the matter of testimonial utterances, the truth runs the risk of being smothered and the judicial decision which are is based on the discoveries which tainted by falsehoods would never be conducive to justice. Therefore, even on a bare reading of the provisions of s. 27 we have no doubt in our mind that the statement of the accused contemplated by that section must be a voluntary statement, and not the one which is induced by threat, inducement or third degree methods.

> ... since the statement induced by the police officer is not voluntary, that statement cannot be considered to be the voluntary statement of the accused and therefore **even if s. 24 of the Evidence Act was not on the statute book** this statement being not of the accused should be taken out of consideration. (bold added).

In *R v. Barker* [1941] 2 KB 381 CCA (a tax offence case), documents produced by an accused in consequence of inducement held out or made to him were held inadmissible. Delivering the judgment of the court, Tucker J, recognising the case raising "questions of difficulty and importance," said: (pp. 384-385)

> ... the court is of opinion that if, as a result of a promise, inducement or threat, such books and documents are produced by the person or persons to whom the promise or inducement is held out, or the threat made, those documents stand on precisely the same footing as an oral or a written confession which is brought into existence as the result of such a promise, inducement or threat.
>
> The result is that, in the opinion of the court, these vital documents and books ... of the appellant, were wrongly admitted in evidence ... .

Although the particular decision in *R v. Barker, supra,* was reversed by s. 105 of the Taxes Management Act 1970 (English), the above principle enunciated therein remained valid in England until the coming into force of the Police and Criminal Evidence Act 1984 (English) more particularly s. 76 and 82 thereof. Even then, the same conclusion may be reached in practice under the said 1984 Act.

Discretion To Exclude Evidence

Apart from the above, has the court the discretion to exclude statement of an accused not voluntarily made?

In West Malaysia, the English common law as administered in England on 7 April 1956 applies except where other statutory provision has been made. See s. 3(1)(a) of the Civil Law Act 1956 which reads:

> 3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall –
>
> (a) in West Malaysia or any part thereof, apply the common law of England and rules of equity as administered in England on the 7th day of April 1956.

The operative part at the commencement of s. 3(1) ie, "Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia," does not, in our opinion, take away the discretionary power to exclude the confessions in appropriate cases since we, relying on the cases

cited, have accepted that s. 24 of the Evidence Act 1950 has no application to section 27 information. That being so, the court is thrown back on its common law powers.

In *Noor Mohamed v. The King* [1949] AC 182 Lord du Parcq said: (p. 192)

> ... in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but **cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge**." (bold added).

It is clear from his Lordship's judgment (as emphasised) that there is a vested discretion in a trial judge to exclude evidence which is prejudicial to an accused even though the said evidence may be "technically admissible". The general pronouncement made in *Noor Mohamed v. The King, supra,* had been followed in numerous other cases in England and is entrenched in the principle that the English court upholds, which is, it is "a judge's undoubted duty to ensure that the accused has a fair trial ..." (per Lord Salmon in *R v. Sang* [1980] AC 402 at p. 445.)

Noor Mohamed v. The King, supra, was consistently adopted in Malaysia, see eg, *Kan Sik Fong v. PP* [1961] 27 MLJ 163; *PP v. Haji Kassim* [1971] 2 MLJ 115 FC; *Rauf bin Haji Ahmad v. PP* [1950] 16 MLJ 190; *Tan Geok Kwang v. PP* [1949] 15 MLJ 203.

In *Kuruma v. R* [1955] 1 All ER 236 P.C. Lord Goddard CJ, relying on *Noor Mohamed v. R* [1949] 1 All ER 365 at p. 370 and *Harris v. Public Prosecutions Director* [1952] 1 All ER 1044 at p. 1048 said: (at p. 239)

> No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.

And he suggested that evidence obtained from an accused, for example, by trick might be excluded.

In our instant case the learned trial judge had entertained grave doubt as to the voluntariness of the section 27 information of the accused. That being so, it was open to the trial court to exercise its discretion whether to let in the information as part of the trial. The learned trial judge had not exercised the discretion. We are therefore at liberty to exercise. In our view, the principle of fairness requires the discretion to be exercised in excluding the information.

Principle Of Fairness

The essence of natural justice is fairness. The following observation of Lord Diplock in *Haw Tua Tau v. PP* [1981] 2 MLJ 49 PC, though in reference to arts. 9(1) and 12(1) of the Constitution of Singapore (similar to art. 5(1) and 8(1) of our Federal Constitution), is of relevance. Lord Diplock said (p. 50):

> So no amendment to the Constitution is needed to empower the legislature ... to enact whatever laws it thinks appropriate to regulate the procedure to be followed at the trial of criminal offences ... ; subject only to the limitation that ... such procedure does not offend against some fundamental rule of natural justice. It must not be obviously unfair.

Fairness requires fair trial which, in turn, needs fair procedure. Fair process requires that the legitimate interests of both the prosecution and the defence are adequately provided for. While the police ought to be given a reasonable opportunity to question suspects and accused persons, in its investigation, the accused must also be reasonably protected from the danger of extraction of unreliable statements and of statements (even if reliable) by some improper means. Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. The court should ensure that the standards of propriety in obtaining section 27 information are scrupulously followed in police station.

Moreover, admitting the appellant's section 27 information would infringe the principle of right against self-incrimination, there being no evidence of s. 112(ii), (iii) and (iv) of the Criminal Procedure Code having been complied with.

In short, since the learned trial judge in the instant case under appeal had found that the section 27 information of the appellant was not voluntarily made, it is irrelevant. It was not the appellant's own statement and was extracted from him in contravention of the privilege against self-incrimination and would be unfair to have it admitted against him. The facts and circumstances of the case show that the section 27 information obtained has an adverse effect on the fairness of the proceedings so that the learned trial judge ought not to have admitted it.

For the aforementioned reasons, we are of the view that section 27 information of the appellant ought to have been excluded from evidence in the discretion of the court which was not exercised by the trial judge.

With the exclusion of the section 27 information, we find that there is no or insufficient evidence to justify the conviction of the appellant on the 1st charge. It will be recalled that we have earlier on quashed the conviction on the 2nd charge. Accordingly and for all the reasons given, we allow the appeal, quash the convictions and set aside the sentence imposed and enter an order of acquittal and discharge in respect of the 1st and the 2nd charges.

There remains the question of retrial. We have considered the facts and circumstances of this case including the fact that the alleged offences took place more than 10 years ago, that the appellant had also been under detention and imprisoned for more than a decade and that the only evidence against the appellant on the charges was the section 27 information which we have ruled to be inadmissible, the cautioned statement of the appellant made on 30 June 1988 having been rejected at the trial by the learned trial judge. In all the circumstances we are of the considered opinion that this is not a proper case for ordering a retrial.